No. 80-961

In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL TRADE COMMISSION, PETITIONER

v.

OFFICIAL AIRLINE GUIDES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JAMES H. SNEED
General Counsel
Federal Trade Commission
Washington, D.C. 20580

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In the petition, we have demonstrated that the court of appeals erred in setting aside the Commission's order on the basis of dicta in *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919) (Pet. 17-18); that the court's concerns about undue extension of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, are unfounded (Pet. 18-20); and that the decision here conflicts with *LaPeyre* v. *FTC*, 366 F.2d 117, 120-121 (5th Cir. 1966) (Pet. 12-14). Respondent's brief in opposition raises several additional contentions that we discuss briefly below.

1. The Commission's decision declared Donnelley's conduct unlawful under Section 5 based on competitive considerations fundamental to the antitrust laws: that a monopolist must "take into account the effect on competition" of its intentional discriminatory action (Pet. App. 76a; see also Pet. 10-16). Respondent therefore mischaracterizes the record in contending

(Br. in Opp. 10-11) that, in this Court, the Commission is attempting to shift its legal theory from an antitrust theory to some other "unfair methods of competition" theory under Section 5 of the FTC Act. If respondent is contending that the Commission's decision rests exclusively on Section 2 of the Sherman Act, it simply disregards the Commission's express disavowal of that intent (Pet. App. 74a n.39). From the beginning, this case has been founded on antitrust principles applicable under Section 5 even though a Sherman Act suit might not lie against the challenged conduct (Pet. 10-14). Respondent itself correctly describes the Commission's holding to be that its conduct was " 'inconsistent with the fundamental goals of antitrust' * * * and that Donnelley thus had violated Section 5 of the FTC Act" (Br. in Opp. 6). These conclusions rested on the Commission's findings that Donnelley's refusal to publish commuter air carrier connecting flight schedules, while publishing the schedules of competing carriers, was arbitrary, caused commuter air carriers significant competitive injury, and represented an abuse of Donnelley's monopoly position. After thoroughly scrutinizing the record, the court of appeals agreed that Donnelley had not offered the Commission any explanation for its refusal to list commuter flights (Pet. App. 8a).[1] The factual issues

[1] Donnelley now contends that its exclusion of the commuter air carriers' schedules were justified "by the economic necessity to preserve the integrity of its publication" (Br. in Opp. 13). In the court of appeals, however, Donnelley conceded that "the Commission's opinion [concerning the absence of any explanation] is correct. * * * Donnelley did not argue the issue" (C.A. Br. 39-40). The purported justifications it now invokes pertained to a separate issue on which Donnelley prevailed before the Commission—whether Donnelley's re-

in this case have thus been resolved by the Commission's findings as sustained by the court of appeals. The only legal issue before this Court is whether a monopolist who unilaterally and arbitrarily (*i.e.*, without reasonable business justification) inflicts injury upon competition in a market in which it does not compete violates Section 5 of the FTC Act.

2. Donnelley challenges (Br. in Opp. 17-18) the court of appeals' holding that the Commission has "subject matter" jurisdiction over its activities. It invokes Section 5(a)(2) of the FTC Act, 15 U.S.C. 45(a)(2), which exempts from the Commission's jurisdiction "common carriers subject to the Acts to regulate commerce, [and] air carriers and foreign air carriers subject to the Federal Aviation Act of 1958 * * *." Donnelley appears to reason that, although it is a publisher not regulated under the Federal Aviation Act, it enjoys complete immunity because its misconduct, as distinguished from its status, involved activities affecting competition in the air carriage market. That argument is without foundation, as the court of appeals correctly explained: "[I]t is of no significance that the publishing of airline schedules is an activity affecting competition among air carriers subject to the Federal Aviation Act. Since Donnelley is not itself an air carrier, it is not beyond

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fusal to merge certification and commuter listings under comprehensive city-pair headings was anti-competitive under Section 5 (Pet. App. 33a-45a, 78a). Donnelley's further contention that its conduct had only a *de minimis* effect on air carrier competition was also properly rejected by the court of appeals because substantial evidence supported the Commission's finding that its exclusionary practices affected commerce involving "tens of millions of dollars" of revenues in city-pairs where commuter and certificated carriers compete (Pet. App. 7a).

the Commission's jurisdiction" (Pet. App. 6a). Were the law otherwise, unregulated firms dealing with regulated industries listed in Section 5(a)(2) would be sheltered from any remedy under Section 5 for their illegal conduct affecting such industries.

Donnelley appears to suggest that this holding by the court of appeals conflicts with *Fruit Growers Express Inc.* v. *FTC*, 274 F. 205 (7th Cir. 1921), cert. dismissed, 261 U.S. 629 (1923). That case involved a contract between a supplier of railroad cars and certain common carriers by rail. Rail carriers are also excepted from the Commission's jurisdiction by Section 5(a)(2). The Seventh Circuit's decision setting aside the Commission's order turned on its conclusion that the carriers were necessary parties to the Commission's proceeding challenging the contract, who could not be joined because of the common carrier exception (274 F. at 206). *Fruit Growers* appears to be of questionable validity today.[2] In any event, in this case the court of appeals correctly distinguished *Fruit Growers* and ruled that "there is no claim that air carriers are necessary parties. The Commission has specifically found Donnelley's action to be unilateral abuse of its market position and has specifically found that air carriers were not parties to the allegedly illegal acts" (Pet. App. 7a). Thus, the fact that Donnelley's publishing activities affected air carrier competition does not defeat the Commission's jurisdiction.

3. The record refutes Donnelley's claim (Br. in Opp. 15-17) that the Commission's order is inconsistent with the First Amendment because, in Donnelley's view, the Official Airlines Guide is an informational

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[2] See *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 363, 365-366 (1940); *PepsiCo, Inc.* v. *FTC*, 472 F.2d 179 (2d Cir. 1972), cert. denied, 414 U.S. 876 (1973).

directory more analogous to a newspaper than to a simple listing of advertisements.[3] Even a cursory examination of the OAG confirms the Commission's finding that (Pet. App. 82a; footnote omitted):

> The OAG * * * is not a newspaper, and it is *not even* a "passive receptacle or conduit for news, comment, and advertising"—it is a passive receptacle only for "commercial" speech. Of course, the fact that the OAG is not a newspaper and contains only commercial speech does not mean that it is not entitled to First Amendment protection. See, *e.g.*, *Virginia State Bd. of Pharmacy*, [425 U.S. 748 (1976)]; *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977). But it does mean that it is not entitled to the same high level of protection that is applicable to other forms of speech. See *Ohralik* v. *Ohio State Bar Ass'n.*, 436 U.S. 447 (1978); *Friedman* v. *Rogers*, 47 U.S.L.W. 4751 (S.Ct. Feb. 20, 1979) * * *.

Moreover, commercial speech that is integral to illegal activity is not protected by the First Amendment. *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, No. 79-565 (June 20, 1980). While the Commission's order may curtail a measure of Donnelley's commercial editorial discretion that otherwise would enjoy constitutional protection, such a curtailment "is a necessary and, in cases such as this, unavoidable consequence of the violation." *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 697 (1978). The First Amendment does not make it impossible to enforce against publishers federal statutes prohibiting unilateral or collective restraints of trade (*ibid.*). See *Lorain Journal*

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[3] In view of its restrictive reading of *Colgate*, the court of appeals did not reach Donnelley's contentions under the First Amendment (Pet. App. 2a).

Co. v. *United States*, 342 U.S. 143 (1951); *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 139-140 (1969).

Donnelley also is in error in arguing (Br. in Opp. 17) that, "in the absence of any anticompetitive motive or intent," the First Amendment bars the government from compelling it to list commuter schedules. If Donnelley's conduct violates the competitive principles underlying Section 5, then the Commission may redress the injury by requiring publication of omitted information because it is dealing with commercial speech related to an unlawful activity. Moreover, in cases of anti-competitive refusals to deal, the question is not whether there is an absence of anti-competitive motive or intent, but whether the challenged conduct involves a commercial entity using commercial means to restrain competition. See Pet. 19-20. Cf. *Missouri* v. *National Organization for Women*, 620 F.2d 1301 (8th Cir.), cert. denied, No. 79-2037 (Oct. 6, 1980). As shown above (note 1, *supra*), Donnelley offered no justification whatsoever for its refusal to list the commuter carriers. Donnelley's arbitrary refusal to deal was not explained upon social or political grounds, or even commercial grounds. Accordingly, Donnelley's invocation (Br. in Opp. 16-17) of *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), is entirely misplaced. Donnelley's arbitrary exclusion of the commuter air carriers' schedules cannot be compared to the editorial judgment in the field of political speech at issue in *Tornillo*.[4] Cf. *Pittsburgh Press Co.*

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[4] There also is no merit in Donnelley's contention (Br. in Opp. 2) that "this case was moot as a matter of fact—if not as a matter of law—for more than three years prior to the entry of the Commission's order * * *." Section 5(b)

v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973).

CONCLUSION

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES H. SNEED
General Counsel
Federal Trade Commission

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of the Federal Trade Commission Act, 15 U.S.C. 45(b), expressly authorizes the Commission to issue cease-and-desist orders upon finding that any "person, partnership, or corporation *has been* or is using any unfair methods of competition * * *" (emphasis added). The law recognizes no distinction between factual and legal mootness. As to the separate question whether there exists sufficient likelihood of further violations to make injunctive relief necessary, the court of appeals properly held that this was a matter committed to the remedial discretion of the Commission as the trier of fact. It found "no evidence of an abuse of discretion since quite plainly the mere cessation of illegal activity—even coupled with a promise to obey the law in the future—will not defeat the entry of a cease and desist order" (Pet. App. 16a). See *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 634 (1953). Respondent has not challenged the court of appeals' determination on the necessity of a remedy.

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